

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:12-cr-00004-MMD-GWF

Plaintiff,

v.

ORDER

QASIR MUKHTAR, et al.,

(Def.'s Appeal From the Magistrate
Judge's Detention Order – dkt. no. 202)

Defendants.

Before the Court is Defendant Qasir Mukhtar's Appeal From the Magistrate Judge's Detention Order ("Appeal"). (Dkt. no. 202.) For reasons discussed below, the Magistrate Judge's Order Denying Defendant's Motion for Pretrial Release is affirmed.

I. BACKGROUND

Because the Order Denying Defendant's Motion for Pretrial Release (dkt. no. 184) contains a detailed account of the facts in this case, this Order only briefly recounts the pertinent facts.

Defendant Qasir Mukhtar is charged in a multi-count, multi-defendant criminal indictment. The indictment alleges that Mukhtar was a member of an international criminal organization called Carder.su. Carder.su traffics and produces counterfeit identification documents and unauthorized access devices via the Internet. The Indictment alleges that Mukhtar was a "vendor" at Carder.su. Vendors in the organization advertise and sell products, services, and other contraband to members of Carder.su. Mukhtar is charged with possession of fifteen or more counterfeit and

1 unauthorized access devices, conspiracy to possess and possession of illegal device-
2 making equipment.

3 Mukhtar immigrated to the United States from Pakistan in 1999. He was fifteen
4 and came on a visa. His visa since expired and he currently resides here illegally. Both
5 of his parents and five of his six siblings currently reside in Pakistan. Mukhtar is married
6 to Sadia Mehjabeen. The two have been together for approximately five years.¹ Ms.
7 Mehjabeen is a United States citizen. Before Mr. Mukhtar's arrest, he and Ms.
8 Mehjabeen lived in New York.

9 Mr. Mukhtar made his initial appearance before a magistrate judge in the Eastern
10 District of New York on March 15, 2012. He was temporarily detained and a detention
11 hearing was set for March 21, 2012. Following that hearing, the magistrate ordered
12 Mukhtar detained and transferred to the District of Nevada for further proceedings.
13 Mukhtar's initial appearance, arraignment, and plea took place on April 9, 2012. At the
14 hearing Mr. Mukhtar's then-attorney stated that he had been informed that Immigration
15 and Custom Enforcement ("ICE") had lodged a detainer against Defendant and Mr.
16 Mukhtar would therefore "submit" on the issue of pretrial detention.² Counsel for the
17 government agreed and argued that Mr. Mukhtar should be detained for several
18 reasons, including but not limited to the ICE detainer.

19 Defendant pled not guilty. Pursuant to the Complex Case Scheduling Order (dkt.
20 no. 147) entered on April 24, 2012, trial in this case is presently scheduled for February
21 26, 2013.

22 On July 1, 2012, Defendant filed a motion for pretrial release. (Dkt. no. 173.) His
23 Motion was based in part on a June 15, 2012, Memorandum issued by Janet Napolitano,
24 the Secretary of Homeland Security, at the direction of the President. The Memo outlined
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26 ¹This is based on Mr. Mukhtar's interview with Services in the Eastern District of
27 New York. His wife's declaration explained that the couple met in 2004.

28 ²At the time Mr. Mukhtar was represented by government-appointed counsel. He
has since retained private counsel.

1 how the Department of Homeland Security (“DHS”) should enforce immigration laws
 2 against certain young people who were brought to the United States as children and
 3 know only this country as their home. The Memo (hereinafter “DHS Memo”) calls for the
 4 exercise of prosecutorial discretion in regard to such persons, meaning that removal
 5 proceedings should not be commenced against them on the grounds that they are
 6 unlawfully present in the United States. The DHS Memo sets forth certain criteria that
 7 should be satisfied before an individual can be considered for the exercise of
 8 prosecutorial discretion:

- 9 • The individual came to the United States under the age of sixteen;
- 10 • The individual has continuously resided in the United States for five years
 11 preceding June 15, 2012;
- 12 • The individual is currently in school, has graduated from high school, has
 13 obtained a general education development certificate, or is an honorably
 14 discharged veteran of the Coast Guard or United States armed forces;
- 15 • The individual has not been convicted of a felony offense, a significant
 16 misdemeanor, multiple misdemeanor offenses, or otherwise poses a threat
 to national security or public safety; and
- Is not above the age of thirty.

17 The Magistrate Judge determined that the DHS Memo was new information not
 18 available at the time of the detention hearing on April 9, 2012. The Magistrate Judge
 19 further assumed without deciding that Mr. Mukhtar satisfies the criteria for the exercise of
 20 prosecutorial discretion as set forth in the DHS Memo. The Magistrate Judge accordingly
 21 determined that the ICE detainer was “not as significant a factor in favor of detention as
 22 it was at the time of the hearing on April 9, 2012.” (Dkt. no. 184 at 7.) However, the
 23 Magistrate Judge denied Defendant’s Motion for Pretrial release because the
 24 government offered several other reasons why Mr. Mukhtar was a flight risk. (*Id.*)

25 **III. DISCUSSION**

26 **A. Legal Standard**

27 The Court reviews the Magistrate Judge’s Order under 18 U.S.C. § 3142(e) de
 28 novo. *United States v. Eischeid*, 315 F. Supp. 2d 1033, 1035 (D. Ariz. 2003) (citing

1 *United States v. Koenig*, 912 F.2d 1190, 1192-93 (9th Cir.1990)). “The Court must
 2 ‘review the evidence before the magistrate’ and any additional evidence submitted by
 3 the parties, ‘and make its own independent determination whether the magistrate’s
 4 findings are correct, with no deference.’” *Id.* (quoting *Koenig*, 912 F.2d at 1193).

5 **B. Reopening the Detention Hearing**

6 The Bail Reform Act of 1984 “requires the release of a person facing trial under
 7 the least restrictive condition or combination of conditions that will reasonably assure the
 8 appearance of the person as required and the safety of the community.” *United States*
 9 *v. Gerbo*, 948 F.2d 1118, 1121 (9th Cir. 1991). “Only in rare circumstances should
 10 release be denied, and doubts regarding the propriety of release should be resolved in
 11 [the] defendant’s favor.” *Id.* (citations omitted). The government bears the burden of
 12 proving by a preponderance of the evidence that the defendant poses a flight risk. See
 13 *id.*

14 The Bail Reform Act, 18 U.S.C. § 3142(f)(2), provides that a detention hearing
 15 may be reopened “before or after a determination by the judicial officer, at any time
 16 before trial if the judicial officer finds that information exists that was not known to the
 17 movant at the time of the hearing and that has a material bearing on the issue whether
 18 there are conditions of release that will reasonably assure the appearance of such
 19 person as required and the safety of any other person and the community.”

20 18 U.S.C. § 3142(g) requires the Court to consider four factors in determining
 21 whether to detain or release a defendant: “(1) the nature and circumstances of the
 22 offense charged, including whether the offense is a crime of violence or involves a
 23 narcotic drug; (2) the weight of the evidence against the person; (3) the history and
 24 characteristics of the person; and (4) the nature and seriousness of the danger to any
 25 person or the community should the person be released.” *United States v. Chen*, 820 F.
 26 Supp. 1205, 1207 (N.D. Cal. 1992).

27 The DHS Memo constitutes new information not available at the time of
 28 Defendant’s detention hearing. Yet even assuming that Defendant meets the criteria set

1 forth in the Memo, the Court determines that the DHS Memo does not constitute new
2 material evidence warranting pretrial release.

3 The government presented six reasons other than the ICE detainer as to why
4 Defendant should not be granted pretrial release: (1) his limited family ties in the United
5 States; (2) his lack of financial resources; (3) his substantial family ties in Pakistan; (4)
6 the seriousness of the criminal charges against him and the potential lengthy sentence
7 he faces if convicted; and (6) that the nature of Defendant's alleged crime – his alleged
8 involvement in trafficking in counterfeit identification, fraudulent credit cards, and money
9 laundering – provides the means to facilitate flight from the United States.

10 **1. Nature and Circumstances of Offense Charged**

11 Defendant is charged with violations of 18 U.S.C. § 1962 (Racketeering-RICO
12 and RICO conspiracy) and 18 U.S.C. § 1029 (Fraud in connection with Access Devices).
13 The amount lost is alleged to be in excess of \$20 million. Mr. Mukhtar faces a possible
14 sentence of twenty or more years in prison. The length of Mr. Mukhtar's potential
15 sentence increases the risk that he will flee the United States because the possibility of a
16 lengthy sentence incentivizes fleeing the country where a shorter potential sentence
17 might not. See *United States v. Parodi*, CR-08-0083 PJH, 2008 WL 683421, at *2 (N.D.
18 Cal. Mar. 7, 2008) (a "defendant's financial condition and the length of sentence he or
19 she faces are of particular importance in assessing the risk of flight.").

20 **2. Weight of Evidence Against Defendant**

21 This factor "is the least important of the various factors." *United States v.*
22 *Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985). Thus, "[a]lthough the [bail reform]
23 statute permits the court to consider the nature of the offense and the evidence of guilt,
24 the statute neither requires nor permits a pretrial determination that the person is guilty."
25 *Id.* (citations omitted). "[I]f the court impermissibly makes a preliminary determination of
26 guilt, the refusal to grant release could become in substance a matter of punishment."
27 *Id.* Accordingly, factor two "may be considered only in terms of the likelihood that the

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1 person will fail to appear or will pose a danger to any person or to the community.” *Id.*
2 (citing 18 U.S.C. § 3142(g) (remaining citation omitted)).

3 Defendant argues that the government’s case against Mr. Mukhtar is weak
4 because it is “predicated almost entirely upon circumstantial evidence,” and “there is no
5 allegation that” he “interacted with, or even knows, any of his co-defendants.” (Dkt. no.
6 202 at 11.) The government, however, argues that the evidence supporting its
7 allegations against Mukhtar is “overwhelming.” (Dkt. no. 215 at 3.) For example, sixty of
8 Mr. Mukhtar’s fingerprints were found on credit cards acquired by an undercover agent in
9 connection with the Carder.su investigation. Moreover, transaction proceeds were sent
10 to a Pakistani bank account under the name of “Saquib Mukhtar.” The government
11 claims that this may be a fake account meant to hide Defendant’s assets made through
12 his Carder.su dealings, because the account is in the “exact same last name” as
13 Defendant’s and “a close anagram of his first name.” (Dkt. no. 215 at 10.)

14 The evidence presented against Mr. Mukhtar weighs against pretrial release.
15 Although the evidence may be wholly circumstantial, “under some conditions
16 circumstantial evidence may be equally or more reliable than direct evidence[.]” *United*
17 *States v. Nelson*, 419 F.2d 1237, 1240 (9th Cir. 1969). Defendant does not explain why
18 the substantial circumstantial evidence presented against him in this case is unreliable or
19 otherwise problematic.

20 For these reasons, factor two weighs against pretrial release.

21 **3. History and Characteristics of Defendant**

22 Under 18 U.S.C. § 3142(g), courts may consider “the history and characteristics
23 of the person, including his character, physical and mental condition, family ties,
24 employment, financial resources, length of residence in the community, community ties,
25 past conduct, history relating to drug and alcohol abuse, criminal history, [and] record
26 concerning appearance at court proceedings.” *Motamedi*, 767 F.2d at 1407.

27 While alienage and immigration status may be considered by a court under the
28 Act, alienage alone “does not point conclusively” to a determination that a Defendant is a

1 flight risk. See *Motamedi*, 767 F.2d at 1408. “When assessing an alien defendant’s ties
2 to the United States, factors to be considered include how long the defendant has
3 resided in this country, whether defendant has been employed in the United States,
4 whether defendant owns any property in this country, and whether defendant has any
5 relatives who are United States residents or citizens.” *United States v. Townsend*, 897
6 F.2d 989, 995 (9th Cir. 1990).

7 Defendant argues that it would be “unwarranted and unreasonable” to make a
8 determination regarding pretrial release based on Mr. Mukhtar’s immigration status.
9 (Dkt. no. 202 at 2.) This is correct. Mr. Mukhtar’s immigration status is of little
10 consequence, and in fact may weigh in his favor. Mr. Mukhtar has continuously lived in
11 the United States since he was fifteen years old, has never returned to Pakistan, and is
12 married to a United States citizen. In fact, Mr. Mukhtar’s immigration status, when taken
13 in isolation, suggests that he would have continued to remain in the United States
14 illegally but for the proceedings in this case.

15 However, several of Mr. Mukhtar’s other characteristics demonstrate that he is a
16 flight risk. As mentioned, his parents and five of his six brothers reside in Pakistan. A
17 “large amount” of the proceeds of Mukhtar’s alleged sales were wired to Pakistan, many
18 to an individual named Saquib Mukhtar, an account the government plausibly argues is
19 a fake meant to hide Defendant’s Carder.su assets in Pakistan. Even if it is not,
20 Defendant’s close familial ties to Pakistan make it likely that he would have sufficient
21 financial support to maintain a living there.

22 Steady employment and financial resources demonstrate a tie to one’s
23 community, and weigh in favor of pretrial release. See *United States v. Honeyman*, 470
24 F.2d 473, 475 (9th Cir. 1972) (finding that the accused’s steady employment and
25 substantial financial resources, including real property, weighed in favor of pretrial
26 release). Mr. Mukhtar is not currently employed nor does he have financial resources in
27 the United States. He informed Pretrial Services that he has been unemployed for six
28 months and has no significant assets but does have some credit card debt. Although

1 Ms. Mehjabeen testified that her husband has been a self-employed owner of a retail
 2 food business that she and he purchased in mid-2011 (though later sold), and that the
 3 pair were working towards opening another restaurant before he was arrested in early
 4 2012, Defendant's Financial Affidavit and statement to Pretrial Services contradict Ms.
 5 Mehjabeen's testimony. In both, Mr. Mukhtar stated that had no assets available to him,
 6 not even an automobile, except for a small amount of cash. (Dkt. no. 110.) Although in
 7 his Appeal Defendant continues to state that he "has actively run his own business" (dkt.
 8 no. 202 at 12), Defendant has not presented Pretrial Services with documentation
 9 supporting these employment claims.

10 While Defendant's marriage shows marital ties to the United States, he also has
 11 at least equal, if not stronger, family ties to Pakistan. Such family ties to Pakistan
 12 coupled with his lack of financial and employment ties in the United States make factor
 13 three weigh against his release.

14 **4. Nature and Seriousness of Danger to any Person or the** 15 **Community that would be Posed by Defendant's Release**

16 At the April 9, 2012, detention hearing, the Court determined that Mr. Mukhtar
 17 does not pose a danger to the community. This factor therefore weighs in favor of
 18 pretrial release.

19 **5. Weighing the Bail Reform Act Factors**

20 The Bail Reform Act factors, 18 U.S.C. § 3142(g), favor affirming the Magistrate
 21 Judge's Order. Although Mr. Mukhtar does not pose a danger to the community and his
 22 immigration and marital statuses favor release, the other factors cited by the government
 23 tip the scales against bail. As mentioned, the weight of the evidence against Mr.
 24 Mukhtar favors pretrial detention. Further, Mr. Mukhtar has significant ties to Pakistan
 25 and there is evidence that he may be concealing funds there. The nature of his alleged
 26 crime, credit card fraud via the Internet, demonstrates that he may have the means and
 27 ability to successfully flee the United States. Finally, the potential length of Mr.
 28 Mukhtar's sentence if he is found guilty – over twenty years in prison – incentivize flight,

1 especially for someone who can successfully seek refuge abroad. For these reasons,
 2 the Magistrate Judge's Order is affirmed in regards to the Magistrate Judge's decision
 3 regarding pretrial release under the Bail Reform Act.

4 **C. Due Process**

5 Defendant also appeals the Magistrate Judge's determination that detaining Mr.
 6 Mukhtar until February 2013, the expected date of his trial, does not violate his
 7 constitutional right to due process.

8 In *United States v. Salerno*, 481 U.S. 739, 746-47 (1987), the Supreme Court
 9 upheld the constitutionality of the Bail Reform Act against a substantive due process
 10 challenge. While the Court stated that the maximum length of pretrial detention is limited
 11 by the Speedy Trial Act, it "intimate[d] no view as to the point at which detention in a
 12 particular case might become excessively prolonged, [and] therefore punitive" *Id.* at
 13 747, n.4.

14 "[M]ost courts, when responding to due process motions of this kind, have tended
 15 to focus principally on three factors: (1) the non-speculative length of expected
 16 confinement; (2) the extent to which the government (the prosecution and/or the court
 17 system) bears responsibility for pretrial delay; and (3) the strength of the evidence
 18 indicating a risk of flight, a threat to the trial process, and/or a danger to the community."
 19 *United States v. Ailemen*, 165 F.R.D. 571, 581 (N.D. Cal. 1996) (citing *United States v.*
 20 *Millan*, 4 F.3d 1038, 1038 (2d Cir. 1993); *United States v. Melendez-Carrion II*, 820 F.2d
 21 56, 59 (2d Cir. 1987); *United States v. Gonzales Claudio*, 806 F.2d 334, 340 (2d Cir.
 22 1986); *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986); *United States v.*
 23 *Gallo*, 653 F. Supp. 320, 338 (E.D.N.Y. 1986)). *Ailemen* summarized the "pertinent
 24 authorities" on due process challenges to pretrial release determinations, and found a
 25 pattern:

26 It appears that the cases fall into three groups, which are separated from
 27 one another primarily (but not precisely) by the length of the expected
 28 pretrial detention. In the first group, the length of detention already served,
 or of non-speculative expected detention, is relatively short, between about
 six months and a year. In this setting, many courts refuse even to entertain

1 due process challenges, concluding that the issue is not ripe. Generally,
2 these courts announce this position without conducting a full analysis of the
three main factors used in the balancing approach.

3 By contrast, when expected detention is of medium length, between just
4 under a year and about two years, courts usually examine, in some detail,
all three of the main factors in the balancing approach. In this group of
5 opinions, however, there appears to be some (soft) correlation between the
findings about the presence or absence of unnecessary delay that is
6 chargeable to the government and the outcomes of the due process
analyses. In many (but not all) of the cases that fall into this middle group,
7 the courts seem inclined to find a violation of the due process clause if they
find that the government was responsible for substantial delay, but when
8 the courts find that the government is not chargeable with any significant
portion of the delay they are less likely to grant the defendant's motion.

9 The third and final group . . . consists of cases where the expected pretrial
detention is very long, more than two years. In this category, the courts,
10 with one notable exception, have upheld the defendant's detention only if
the government did not bear responsibility for any significant portion of the
11 delay *and* there were special circumstances indicating that the risk of harm
to the government's interests (preventing flight, danger to the community,
12 or threat to the judicial process) was extraordinarily acute.

13 165 F.R.D. at 582-83.

14 Defendant argues that the Magistrate Judge incorrectly determined that because
15 Mr. Mukhtar's pretrial detention period will be approximately one year, the due process
16 claim is not ripe for review. Defendant asserts that because the trial in this case "may
17 well be moved" to a later date because of the case's complexity, Mr. Mukhtar's Fifth
18 Amendment right to due process will be violated were the Court to affirm the Magistrate's
19 Order. (Dkt. no. 202 at 22-23.)

20 Defendant incorrectly states that the Magistrate Judge rejected Mr. Mukhtar's due
21 process claim solely on the grounds of ripeness. The Order reads as follows:

22 Because Mr. Mukhtar'[s] expected pretrial detention will be approximately
23 one year, the due process issue is arguably not ripe for review. *To the*
24 *extent it is ripe, however*, the Court finds that Defendant's pretrial detention
does not violate due process at this point.

25 (Dkt. no. 184 at 16) (emphasis added.) In fact, the likely length of Mr. Mukhtar's
26 detention falls in between the "short" and "medium" lengths discussed in *Aileman*. 165
27 F.R.D. at 582. The Magistrate Judge accordingly analyzed Mr. Mukhtar's claim under
28 both the standards, and determined that because (1) Defendant poses a flight risk and


1 (2) there is no evidence of the government unnecessarily delaying the case, pretrial
2 detention does not violate Mr. Mukhtar's right to due process. (Dkt. no. 184 at 16.) The
3 Magistrate Judge did, however, determine that "[i]n the event trial is continued for a
4 significant period of time," Mr. Mukhtar "may have grounds to renew his motion for
5 pretrial release based on his constitutional right of substantive due process." (*Id.* at 17.)

6 The Court affirms the Magistrate Judge's decision on this claim. Pretrial detention
7 does not violate Mr. Mukhtar's due process rights. Assuming *arguendo* that Mr.
8 Mukhtar's length of detention falls into the "medium" *Ailemen* category, the length of
9 detention is reasonable here. All parties agree that this is a complex case. That is the
10 only proffered reason why Mr. Mukhtar's trial cannot be held until February 2013. There
11 is no evidence that the February trial date is the result of unnecessary delay on the part
12 of the government. Coupled with the fact that Defendant poses a flight risk, detaining
13 Mr. Mukhtar before trial does not violate his right to substantive due process. However,
14 the Magistrate Judge was also correct in determining that Mr. Mukhtar's due process
15 rights may be compromised if the trial is continued beyond February 2012. In light of
16 this, the Court urges the parties to conduct discovery in a speedy fashion, as it is unlikely
17 that requests for continuances will be granted.

18 **IV. CONCLUSION**

19 IT IS THEREFORE ORDERED that Defendant's Motion (dkt. no. 202) is DENIED.

20 Dated this 28th day of September 2012.

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UNITED STATES DISTRICT JUDGE